No. 3512

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC LIVE STOCK COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE WARM SPRINGS IRRIGATION DISTRICT, a Municipal Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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STATEMENT

In 1895 the legislature of Oregon passed an act providing for the organization of irrigation districts as public bodies and agencies of the State with the powers of taxation, eminent domain, and other attributes of municipal corporations, to be managed and conducted for the public benefit (Lord's Oregon Laws, Secs. 6167-6217). The law was adopted from the California act of 1887 known as the Wright Act. It has been amended from time to time to keep step with the growth of public sentiment on the subject of water conservation, and with the development of irrigation projects through public instrumentalities, and was re-enacted, with various amendments adopted *ad interim*, in 1917 (General Laws of Oregon 1917, Chap. 357, pp. 743-781).

The following is a brief outline of the act, with quo-

tation of such sections as are deemed necessary to the decision of this case:

Section 1 provides for organization of an irrigation district whenever fifty or a majority of the owners of land irrigated or susceptible of irrigation desire to purchase, construct and operate works, or to assume as principal or guarantor indebtedness on account of district lands to the United States under the Federal reclamation laws, and sets out the procedure necessary.

Sections 2 to 13 provide for a hearing on the petition by the county court, notice of election for organization of the district, conduct of said election, canvass of votes by the county court, certification of the result, election and qualification of officers of the district, organization, meetings and quorum of the board of directors.

Section 14 authorizes and empowers the board to take conveyances in the name of the district; to maintain actions and suits, and the court shall therein "take judicial knowledge of the organization of, and boundaries" of irrigation districts.

Section 15 contains directions for surveys and plans, appointment of engineer, adoption in whole or in part of any surveys, plans and specifications which may have been made, submission thereof to and approval by State Engineer.

Sections 16 and 17 provide for advertising proposals for work, and letting contracts, and prohibit any director or officer from being personally interested in any such contract.

Section 18 provides for contract with the United States to acquire control over Government land within the district and of complying with the provisions of the Act of Congress to promote reclamation of arid lands, approved August 11, 1916; to assume as principal or

guarantor indebtedness to the United States; to pledge its bonds, etc., and "any property acquired by the district may be conveyed to the United States insofar as the same may be needed by the United States for the construction, operation and maintenance of works for the benefit of the district under any contract that may be entered into with the United States pursuant to this Act."

Sections 19 to 23 prescribe procedure for bond elections, sale of bonds, payment and redemption of bonds and interest coupons, contract with the United States, etc.; sections 24 to 27 provide for assessment and taxation; section 28 for method of payment of claims; section 29, qualification of voters, and section 30, contest of elections.

Section 31, as amended by an act of the legislative assembly of 1919 (General Laws of Oregon 1919, Chap. 267, p. 443 effective May 22, 1919) confers powers of eminent domain and is as follows:

> Section 2. That section 31 of Chapter 357 of the general laws of Oregon for the year 1917 be, and the same hereby is, amended so as to read as follows:
>
> Sec. 31. Eminent Domain. This board and its agents and employes shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation or drainage works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights, rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, re-

pair and improvement of any canal or canals and works proposed to be constructed by said board, and shall also have the right to so acquire lands, and all necessary appurtenances for reservoirs and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of said district. The property, the right to condemn which is hereby given, shall include property already devoted to public use which is less necessary than the use for which it is required by the district, whether used for irrigation or any other purpose. The right of way is hereby given, dedicated and set apart, to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state. In the acquisition of property or rights by condemnation, the board shall proceed in the name of the district under the provisions of the laws of the state of Oregon.

The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with all water rights and rights to appropriate water, rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use more necessary and more beneficial than any other use, either public or private, to which said water, water rights, rights to appropriate water, lands or other property have been or may be appropriated within said district.

The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act; and said board is hereby authorized and empowered to hold, use, acquire, manage, occupy, possess and dispose of said property as herein provided.

The remaining sections of the act, 32 to 50, are not material to any question raised by the assignments of error.

The defendant in error was duly created and organized under the provisions of this law, and whatever question there may have been respecting the legality and regularity of its organization was set at rest by the Supreme Court of the State of Oregon in the case of *Herrett v. Warm Springs Irrigation District,* 86 Or. 343, affirming an adjudication to that effect made by the Circuit Court of the State of Oregon for Malheur County, Oregon. Since the decision in that case, the same court has held that proceedings for the confirmation of the organization of an irrigation district and the issuance of its bonds, under the law above referred to, are in the nature of proceedings in rem, and that the Supreme Court on appeal from a decree of confirmation must examine every question presented by the record whether discussed in the briefs or not (*Board of Directors of Medford Irr. Dist. v. Hill* (Or.), 190 Pac. 957, decided July 6, 1920).

For over a quarter of a century plaintiff in error was the owner of a tract of some 2500 acres of land (Transcript pp. 98, 268) situated in the Warm Springs Valley along the Malheur River in Harney and Malheur Counties, Oregon, which it operated as a cattle ranch. The tract is about five miles long following the main direction of the river, and varies in width from one-quarter of a mile to over a mile (Exhibits 2, 9, 11). In its natural state the land lying near the river is covered with a growth of willows and water grasses. Further away from the stream the vegetation consists of rye grass, greasewood and sagebrush, growing sparser and in patches as the higher levels are reached until the hill sides are practically barren of all growth except for a

short time in the spring. During summer, autumn and early winter the Malheur River is a small stream, carrying only a few inches of water, but the rains and melting snows of the mountains where it has its source in late winter and spring give it an enormous flow. For the purpose of storing, conserving and utilizing the surplus water, otherwise wasted, for diversion to arid lands at a season void of natural irrigation, the Warm Springs project was formed.

In the early '90s the Pacific Live Stock Company, then controlled by the late Henry Miller, of Miller & Lux, made strenuous efforts to bring the land under cultivation. These efforts were continued at great expense for many years but were unsuccessful owing to the nature and topography of the soil. The story of man's struggle with adverse natural conditions is related graphically by John Gilchrist (Transcript, pp. 272-294, 304-308, 313-316) who was superintendent of this and nineteen other cattle ranches of the company in Oregon and twenty in Nevada for twenty-five years, and the facts and circumstances testified to by him are practically uncontroverted. Never more than a few hundred acres were brought under cultivation and for several years prior to the time of the trial of this cause there were only about 360 acres (alfalfa and garden) which could be called under cultivation (Exhibits A, 11; Trans. pp. 96, 126, 174, 193, 210, 213, 227, 246, 267, 392, 405, 415).

A short distance below the tract the Malheur River enters a narrow canyon at which point the Irrigation District constructed its dam to a height sufficient to store 170,000 acre feet of water. The dam is constructed on government land 1400 feet south of the south line of the lands condemned. With the reservoir full the water will overflow all of the lands of plaintiff in error

appropriated in this action except about 158 acres (Exhibits 1, 2, 9; Trans. p. 87) which comprise the isolated outlying fractional portions of 40-acre subdivisions on the hill lands situated above the irregular high water flow line, as shown on the map prepared by the engineer (Exhibit 9).

The Irrigation District began action to condemn the lands first in 1916 but dismissed it in 1917 (Trans. 33, 243-244). That case reached the Oregon Supreme Court on the question of attorney's fees and was disposed of before the commencement of the present suit (*Warm Springs Irrigation District v. Pacific Live Stock Co.* 89 Or. 19) and has nothing to do herewith.

The present action was begun in the State Circuit Court for Malheur County, Oregon, July 3, 1919, but was removed to the Federal Court (Trans. 14-22) where the Company interposed a motion to make the complaint more definite (Trans. 23) and a demurrer (Trans. 26), both of which were overruled (Trans. 28).

The complaint is in the usual form and alleges the facts required by the statute to be stated. Section 31 (Laws of Oregon 1917, p. 763) above quoted provides *inter alia*:

> "In the acquisition of property or rights by condemnation the board shall proceed in the name of the district under the provisions of the laws of the State of Oregon."

Section 6859, Lord's Oregon Laws, as amended by Chapter 175, Laws of 1913 (Laws of Oregon 1913, p. 315) provides:

> "Whenever any corporation authorized as in the provisions of this act, to appropriate lands, rights of way, right to cut timber, or other right or easement in lands, is unable to agree with the owner thereof as to the compensation to be paid therefor, or if such owner be absent from this state,

such corporation may maintain an action in the circuit court of the proper county, against such owner, for the purpose of having such lands" * * * appropriated to its own use, and for determining the compensation to be paid to such owner therefor."

Section 6860, Lord's Oregon Laws, provides: "Such action shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided."

Section 6862 Lord's Oregon Laws, provides: "The complaint shall describe the land, right or easement sought to be appropriated with convenient certainty."

By stipulation the cause was tried to the court, a jury being waived (Trans. 47), and in a memorandum opinion handed down November 24, 1919, the trial judge announced his conclusions appropriating the lands to defendant in error and fixing the market value thereof (Trans. 48-52). Special findings of fact on the issues, along with conclusions of law were made and filed December 2 (Trans. 52-60), and judgment thereon was entered December 9, 1919, giving plaintiff in error $90,000, besides attorney's fees, costs and disbursements amounting in all to $97,240.40 and appropriating the lands therein described to defendant in error (Trans. 61-64). In the course of the trial it developed that the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of section 2, Township 22 South, range 36 East in Harney County, described in the last six lines of paragraph VI of the complaint (Trans. 11) would not be reached by the highest flow line of water in the reservoir, and the said 80 acres were omitted from the judgment of condemnation (Trans. 63).

During the pendency of said action plaintiff in error

began a suit on the equity side of the Federal Court to enjoin the district from proceeding with the erection of its reservoir dam, and the court therein required the district to furnish security "for such damages or compensation as should, in said suit or in any other action or proceeding, be awarded to defendant (plaintiff in error) for the taking of or injury to the lands" described in the condemnation action, including costs. In accordance with such order the district deposited with the clerk of the court below as custodian certificates of deposit issued by the Anglo and London-Paris National Bank of San Franisco, Cal., amounting to $200,000. In its findings and judgment in this case, as well as in the decree in the equity case which was tried at the same time, the trial court made appropriate disposition of said fund by directing that $97,240.40 thereof be converted into bank certificates of deposit to the credit of and payable to the order of defendant (plaintiff in error) and deliverable to it on demand (Trans. 59, 63). Although the writ and assignment of errors raise no question on this point, it may be remarked to complete the history of the case that the deposit was made as directed, certificates of the Anglo and London-Paris National Bank being converted into certificates of the Bank of California, both parties stipulating thereto and agreeing that the same shall be deemed as payment of the amount of the judgment into court in compliance with Section 6866 Lord's Oregon Laws, and without prejudice (Trans. 524). Said section reads as follows: "Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing, or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation."

The Pacific Live Stock Company tendered no findings of fact either before or after judgment and requested no particular findings at any time. One month after the court announced its decision the plaintiff in error filed a motion for a new trial on grounds substantially similar to those advanced as the basis of the writ (Trans. 64-67). The motion was denied.

In 1913 (General Laws of Oregon, Chapter 87, p. 141) the legislature of Oregon passed an emergency act which has a bearing on assignments of error 2, 4 and 13. After providing for co-operation between the State and Federal authorities in the investigation, development and control of the natural resources of the state in land, water and power, and authorizing the State Engineer on behalf of the State to enter into a contract with any federal department or bureau having jurisdiction in such matters for the execution of surveys and investigations, and the preparation of plans, specifications, estimates and other data by co-operation between the State and such federal department or bureau, and for a report of all such surveys and investigations, the act further provides as follows:

> Section 3. The State Engineer, on behalf of the State, is hereby authorized and required to withdraw and withhold from appropriation any unappropriated water which may be required for project under investigation or to be investigated under the provisions of this act. If the project is found to be feasible, he shall withhold the same from appropriation until the money expended in the investigation of such project shall be repaid to the co-operating parties in proportion to the amount contributed by each. No permit to appropriate water which may be in conflict with any such project under investigation shall be approved by the State Engineer, nor shall any assignment of plans and in-

formation or any part thereof be made except upon consideration and other by the State Water Board after full hearing of all interested parties.

May 5, 1913, in pursuance of the power thus granted, and in the name of the State of Oregon, John H. Lewis, who was then State Engineer of Oregon, entered into a contract with the United States by Franklin K. Lane, Secretary of the Interior, for the joint survey and investigation and for preparation of plans and estimates for the Warm Springs project. The contract was approved by the Governor of Oregon (Trans. 81) and thereupon, in co-operation with the United States Reclamation Service a co-operative survey and report was made and compiled by the State of Oregon and the United States government. To secure the expense of the investigation the Warm Springs Irrigation District deposited $4,724.61 for the State of Oregon and $14,-724.61 for the Federal Government in the United States National Bank of Vale, Oregon (Trans. 82, 86, 91; Exhibit 21). The report of that co-operative work is Exhibit 1 in this case (Trans. 74, 75).

On April 26, 1909, by order of the Reclamation Service, Department of the Interior, all public land in the Warm Springs Reservoir site was withdrawn from public entry under the Act of Congress of June 17, 1902; and on March 25, 1911, an order signed by the Director of the Geological Survey, approved by the Secretary of the Interior, was issued reciting that there is ample water in the Malheur River and its tributaries for the irrigation of approximately one hundred thousand acres, and recommending the withdrawal of certain reservoir sites. Attached thereto was an order dated March 31, 1911, signed by William H. Taft, President of the United States, withdrawing from entry the public land in the Warm Springs Reservoir site (Trans. 83, 84).

On April 8, 1914, on behalf of the State of Oregon, the State Engineer withdrew and withheld three hundred thousand acre feet of the waters of the Middle Fork of the Malheur River to be stored in Warm Springs Reservoir for irrigation purposes; and on February 16, 1916, the same official withdrew and withheld from appropriation eight hundred second-feet of water of Malheir River and tributaries for irrigation, power and domestic purposes which may be required for the Warm Springs Reservoir project. Both of these withdrawals were made in accordance with said chapter 87 of the laws of Oregon for 1913, above referred to, and with the aforesaid contract between the Federal Government and the State of Oregon (Trans. 80, 81, 87; Exhibits 3 and 4).

The district made application to the State Water Board for the assignment of the plans, information and water rights withdrawn by the State Engineer as above stated, and the said Water Board in accordance with the above quoted section of Chapter 87, General Laws of Oregon 1913, duly approved and ordered the assignment of said water rights to the district March 5, 1919 (Trans. 82, 83, 90, 91, 465; Exhibits 5, 21). Owing to regulations of the State Engineer's office requiring applications for permits to specify the number of acres in each 40-acre tract proposed to be irrigated, and in order to avoid the confusion of filing a number of applications to conform to changes in the boundary of the district, the original applications were filed tentatively as of April 8, 1914, and February 14, 1916, but were completed and approved by the State Engineer on November 18, 1919, as shown by the testimony of John H. Lewis (Trans. 471-474; Exhibit 21).

ARGUMENT

For convenience and brevity the twenty assignments of error (Trans. 506-515) may be grouped and discussed under three general heads: THE COMPLAINT, involving assignments 1, 2, 3, 4, 5, 13 and 20, which predicate error upon the action of the trial court in overruling demurrer and denying motion to make more definite, and raises questions of the character of title, quantity of interest in and description of the particular lands sought to be condemned, and the contention that it was incumbent upon defendant in error, as a condition precedent to the exercise of its power of eminent domain to appropriate lands for a reservoir site, to show that it possessed rights to the waters of the Malheur River; THE TESTIMONY, comprising assignments 6 to 12 inclusive, of which 6, 7, 8 and 9 challenge the admission of certain evidence as to the value of the lands, and 10, 11 and 12, which go to the qualifications of certain witnesses; THE FINDINGS, under which may be grouped assignments 14 to 19 inclusive which attack the court's discretion and judgment in weighing a mass of conflicting testimony as to the value of the lands and amount of damages to be awarded.

The Complaint.

The Oregon statute on this subject is simplicity itself: "The complaint shall describe the land, right or easement sought to be appropriated with convenient certainty" (L. O. L. Sec. 6862). The public irrigation code (L. O. L. Secs. 6167-6217, as amended and reenacted by Chap. 357, Laws of Oregon, 1917, heretofore referred to will be searched in vain for any requirement that an irrigation district organized thereunder shall, in a complaint for the condemnation of any lands, rights or easements, allege anything more than

a description with *convenient* certainty of the property sought, and the use or purpose for which it is needed. The Oregon Supreme Court has held that in condemnation cases no other judgment than the particular kind of judgment the law authorizes can be rendered (*Oregonian Ry. Co. v. Hill,* 9 Or. 377), from which it necessarily follows of course that the plaintiff in eminent domain proceedings cannot by an averrment in the complaint enlarge the power of the court nor alter the conclusion to be embodied in the judgment. The terms of the judgment are set forth in the statute: "Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation." (L. O. L. Sec. 6866). The learned trial judge therefore, in his decision, properly remarked: "It is not necessary nor do I deem it proper to determine at this time whether such appropriation will amount to the taking of the fee or only an easement. Judgment will follow the language of the statute appropriating the property for reservoir purposes. The legal effect can be determined when the question arises, if it ever does" (Trans. 51-52). Error is predicated on this ruling by assignment 3, but the question of whether defendant in error got a fee or an easement does not arise on this review. The question here is, ought the complaint to allege, in the language of assignment 1, "whether the plaintiff sought to acquire a fee simple title to the land or an easement therein." It is not necessary for plaintiff in condemnation proceedings to set forth whether an easement or a fee in the land is sought (15 Cyc. 857). To claim a fee simple title would be useless unless the court had power to adjudge it in terms, and since the

court's only power is to pass the particular kind of judgment authorized by law the pleader cannot, as a condition of maintaining the action, be required to pray for any other kind. His function is to state the facts upon which the conclusion sanctioned by the statute may follow. Plaintiff in error tried hard to make the court and the defendant in error commit themselves on this point. The defendant in error was frequently challenged to declare whether it was seeking a marketable title or a mere easement with right of reverter in the Live Stock Co. Had it done so and elected either, and had the court passed judgment accordingly, it can not be doubted, in view of the rule in Oregon above cited, that plaintiff in error would have complained that the court had no power in this proceeding to determine whether the Irrigation District took an absolute title or an easement.

The complaint avers inter alia the purpose of the district to be the constructing, equipping, maintaining and operating an irrigation system consisting of dams, reservoirs, canals, flumes and ditches for general irrigation purposes by the public and for public use, and for storing water for future use by the public and especially by owners of land within the boundaries of the district (paragraph III, Trans. 8); the adoption of a location and surveys for a reservoir dam necessary for the convenient use of the district to enable it to fulfill the purpose of its organization to maintain and operate a public irrigation system by storing waters; that said dam is situated about 1400 feet south of the south line of defendant's lands and is to be 107 feet high, giving a highest flow line contour at an elevation of 3420 feet, or thereabouts; that defendant's lands lie in such position with reference to said dam and reservoir site that about 2500 acres thereof will be submerged at said high

flow line by waters stored by the said dam and reservoir (paragraphs IV and V, Trans. 8-10). Then follows a particular description by legal subdivisions of defendant's lands required for said use comprising approximately 2500 acres (paragraph VI, Trans. 10), and the statement, substantially in the language of the statute (Section 6859 L. O. L.), that plaintiff has negotiated in vain with defendant for the purpose of agreeing upon the compensation to be paid for said lands, offering $55,000 therefor and defendant demanding $143,000 (paragraphs VII and VIII, Trans. 11-12). The concluding paragraph and prayer of the complaint (Trans. 12-13), in connection with the allegations of the public purposes and objects of plaintiff's organization and the use to be made of the lands, express all that the law anywhere requires and gave the defendant ample notice of plaintiff's demand and of the issues to be met, namely: "That plaintiff desires to appropriate said lands to its use as hereinabove mentioned (*i. e.* reservoir site for storage of waters), and brings this action to have the damages to the defendant owner of said lands assessed, and to acquire the said lands for the uses and purposes herein set forth. Wherefore plaintiff prays that the said lands * * * hereby sought to be obtained, be condemned to the use of the plaintiff herein for the purposes set forth; * * * and that plaintiff have judgment against the defendant appropriating said lands to its use."

The defendant could not have been misled because all of its testimony was directed to the full value of the lands for any and all purposes, and to the amount which should be paid to it for taking the lands. There will be found no evidence in the record of any valuation of an easement in the lands. Nor was the court misled, for in fixing the amount of compensation to be allowed de-

fendant for the property the trial judge remarked: "The same considerations are to be regarded as in a sale between private parties. The owner is entitled to the full value of the property taken, and that is what it fairly may be believed that a purchaser in fair market conditions would give for it in fact (citing *N. Y. v. Sage,* 239 U. S. 661). Its adaptability for the purposes for which it can be used most profitably is to be considered as far as the public would have considered it if the land had been offered for sale in the absence of an attempt to exercise the power of eminent domain" (Trans. 49). This, and finding XI "that the market value of the lands of defendant * * * which the plaintiff seeks to condemn for a public use, is, and at the time of the commencement of this action was, $90,000 (Trans. 58), makes it clear that, regardless of the character of title or quantity of interest actually acquired in the lands by the judgment of condemnation, defendant was in no degree prejudiced by failure of the complaint to allege whether plaintiff sought an absolute title or a mere easement, because in either event defendant was given the full value of the lands, which ought to preclude lamentation and cavil on its part respecting questions of pleading and procedure in this case.

Now, the plaintiff paid that award and got an appropriation of the lands to its use for reservoir purposes in connection with its public irrigation system. It may or may not be that the judgment of condemnation does in fact and in law give the district an absolute marketable title to those lands so that it may lease or pasture such portions thereof as may from season to season not be overflowed, and may sell and convey the whole or any part thereof, and that the holders of its mortgage bonds, in case of default in payment, may obtain a title freed from any right of reversion in the Pacific Live Stock

Co. for non-user, misuser or abandonment, but this is not the time to discuss that question. As Judge Bean well said concerning it: "The legal effect can be determined when the question arises if it ever does."

The question of the legal effect of that judgment has arisen. A suit was brought on the equity side of the court below by the Pacific Live Stock Company against Warm Springs Irrigation District and others less than a month after the entry of the judgment under review in this case, wherein the only point in issue is whether or not the Irrigation District, by the condemnation proceedings under the laws of Oregon acquired title to the lands or only an easement. An application for a temporary injunction resulted in the memorandum opinion quoted in the Appendix to the brief of plaintiff in error. Since then a trial has been had and a final decree entered in accordance with the prayer of the plaintiff. From that decree defendants are prosecuting an appeal to this court where the question will in due course formally be presented for determination. By the adoption of the course suggested in Judge Bean's opinion and the bringing of a plenary suit to determine the legal effect of the judgment in the condemnation case, plaintiff in error ought to be foreclosed from presenting the same question on this review. It has no place herein—indeed, this is practically conceded at the top of page 17, brief of plaintiff in error. But since it has been dragged in and stressed by citation of authorities in the body of the brief for plaintiff in error, and given factitious emphasis by an Appendix, perhaps the defendants in error may be excused for indulging in an Addenda comprising a statement of their position and anticipating somewhat the argument when the cause comes regularly before this court. But as concerns the merits of the instant case the point is reserved.

The record herein discloses confusion and inconsistency on the part of plaintiff in error. Paragraph 6 of its motion for a new trial alleges (Trans. 67): "The court erred in finding that it *was* necessary for the plaintiff to *take said land* for the reason that it only appeared that it was necessary to *take an easement therein,* and the court also erred in *failing to find* whether it was necessary to take the said *land* or only an *easement* therein, and also erred in failing to find and adjudge whether plaintiff took an *easement* or *fee simple* of said land." Assignment of error 3 says: "The court erred in granting judgment in said cause *without deciding or specifying* whether the plaintiff acquired thereby the *fee simple* title of the said land or only an *easement therein*" (Trans. 507), while assignment 20 (Trans. 514) alleges: "The court erred in finding that it *was* necessary to a public use that the plaintiff acquire the said *property,* for the reason that it appeared by the evidence that it was only necessary for the said plaintiff to acquire an *easement* therein, and no evidence whatever was introduced showing that it was necessary for the plaintiff to acquire the fee simple title to said property." In short, no matter what finding the court might have made on this subject, it would, according to defendant's incongruous contentions, have been wrong. But since the court followed the doctrine of the Oregon case above cited (9 Or. at page 384) and entered the only judgment it was authorized to render in condemnation proceedings, defendant's quarrel is with the law and not with the court. Any other judgment would be without authority of law and a nullity. The only possible inquiry respecting the findings is whether they sustain the judgment rendered, and the discussion of that question more appropriately comes under another division of this argument.

Assignments 2, 4 and 13 present the point that it

was incumbent upon plaintiff, as a condition precedent to its right to condemn lands for a reservoir site, to allege and prove that it had first appropriated waters of the Malheur River. Defendant's position appears to be, in other words, that a public irrigation district cannot condemn a place to store waters until it has acquired waters to store. If the statute explicitly so provided that would be true whether logical or not; but since the law is silent on the subject it is just as reasonable to say that the district has no power to appropriate waters until it has first acquired a place to store waters. The question does not seem important. Whether a man builds a barn before he buys the horse, or acquires the horse first; whether a railroad acquires locomotives or a roundhouse first; whether the expectant parents buy the cradle first or await the arrival of the baby, is all one in the general result. Reservoir, barn, roundhouse and cradle have their place in the general scheme and it makes no difference whether the things to be stored in them come first or last. Of course the legislature could make the prior acquirement of water right by a public irrigation district an essential prerequisite to the exercise of the right of eminent domain to appropriate a reservoir site, or vice versa. Such a provision would be without apparent sense or reason, but these are not always valid grounds for disregarding the law and doubtless under the rule that eminent domain statutes are strictly construed such an act would be given effect. It is sufficient to say, however, that the Oregon legislature has not done so. The act will be searched in vain for any requirement that the district shall acquire or possess a place to store waters before proceeding to condemn water rights or that it must have water before condemning a place to store water. The general effect of its provisions rebuts even an inference to that effect as is shown by

section 31 hereinbefore quoted. In the same sentence granting power to condemn all lands, waters, water rights, rights of way, easements and other property, including canals and works constructed and being constructed by private owners, occurs the clause: "and shall *also* have the right to so acquire (*i. e.* by lease, purchase, condemnation, or other legal means) *lands and all necessary appurtenances for reservoirs* and the right to store water in constructed reservoirs, for the storage of needful waters," etc. The same section gives, dedicates and sets apart any lands which are now or may be the property of the State of Oregon to the district for purposes of location, construction and maintenance of said works over and through the same.

The case of *City of Helena v. Rogan*, 26 Mont. 452; 68 Pac. 798, 801, although not directly in point, is analogous in principle. Proceedings were commenced to condemn water rights in streams situated some distance from the city for the purpose of establishing a municipal water supply system. It seems the defendants raised the point that the complaint failed to allege that the city had obtained or was able to get a right of way to convey the water from the streams to the city. The court said:

> "Is it fatal to omit from the complaint an allegation that the city has a right of way from the creek to the city, or that it is able to get one? It does not appear to be necessary so to allege. It is not any concern of the owners of the property whether the water comes to Helena or not. It would hardly be necessary to allege and prove that the city has engaged the services of a competent civil engineer, and put him under bonds to lay out a feasible route, and to direct and superintend the laying of the pipes so well and faithfully that the water will actually run to Helena, before the own-

ers of the property sought may be required to part with it for a public use. What rights and remedies a city taxpayer, as such, may have in case the plant is foolish, or impossible of execution, is another question; but this we do not now consider."

In *Prescott Irrigation Co. v. Flathers,* 20 Wash. 454; 55 Pac. 635, a private irrigation company, organized for profit, sought to condemn a right of way for a canal to convey waters from the Touchet River. The answer alleged that plaintiff had not purchased nor condemned the rights of the riparian owners on the stream below the head of the ditch. The trial court held that it was necessary for the plaintiff to show that it had acquired water from all the riparian owners of the whole river before proceeding to appropriate a right of way for its canal. In short, that it must have water rights before it could condemn a right of way for a canal in which to convey the water. This ruling was reversed by the Supreme Court which held that under a statute "declaring that irrigation companies shall be deemed public carriers, subject to legislative regulation, such a company is not required to show that it has acquired the right to take waters from a stream from which it proposes to get its supply, from riparian owners, as a prerequisite to its right to condemn land for a right of way."

The case of *Willen v. Hensley School Township,* 175 Ind. 486; 93 N. E. 657, is more closely in point. The school trustees began condemnation proceedings for a school house site and defendant advanced the contentions that the petition should show what steps had been taken to build upon the land after its condemnation, or allege that the trustees had been authorized to create or incur indebtedness for the school house, or that the township intended in good faith to construct a school house thereon. It was held that good faith is presumed

and it is not necessary to allege any of said matters. The case of *Minnesota Canal & Power Co. v. Fall Lake Boom Co.,* 127 Minn. 23; 148 N. W. 561, cited by plaintiff in error on this point, does not appear to throw any light on the question.

In the instant case the State itself may be said to have appropriated waters for the plaintiff by the passage of Chap. 87 of the Laws of 1913, under section 3 of which, heretofore quoted, the State Engineer withdrew from general appropriation the waters of the Malheur River for the use and benefit of the Warm Springs Irrigation District; and on March 5, 1919, before the commencement of this action the State Water Board authorized the issuance of a permit to the district covering the water so withdrawn and appropriated (Trans. 464-469, Exhibit 21). It is contended at page 40 of the brief for plaintiff in error that the filing of an application in 1916 could not constitute an appropriation by the Warm Springs Irrigation District for the reason that it was not in existence until 1918. The record does not confirm this statement. The answer alleges that in 1916 the District offered $25,000 for the land and defendant offered to sell it to plaintiff for $173,643.50 (Trans. 32, 33) and A. R. Olsen, the representative of the Live Stock Co. testified that the District began the first condemnation action in September, 1916 (Trans. 243, 244). It appears from the decision of the Oregon Supreme Court in *Herrett v. Warm Springs Irrigation District,* 86 Or. 343, at pages 347 to 352, that proceedings to organize the District were initiated March 2, 1916, and completed May 29, 1916, and confirmed accordingly. The withdrawals of the State Engineer, under the provisions of the law quoted, of unappropriated waters of the Malheur River for the Warm Springs Project were effective to fix priority, and the permit of

the State Water Board dated March 5, 1919, relating to such withdrawals, for all practical purposes gave to the Warm Springs Irrigation District, organized in March-May, 1916, rights to waters of the stream which were unappropriated at the time of the withdrawals by the State Engineer, April 8, 1914, and February 16, 1916,—certainly such rights as justified it in bringing this action July 3, 1919, to condemn lands for a reservoir site to store waters. This is not a contest between adverse claimants to water rights, and hence the matter of perfecting the application by giving an accurate description of every forty acre tract within the boundaries of the district proposed to be served, as required by the regulations of the State Engineer's office, is in immaterial detail. The fact that it was not done in this case until November, 1919, can not affect the rights of the District in the proceeding. It suffices that the application, permit and appropriation were completed before the trial, and by relation the rights of the District were fixed as of the dates of the original withdrawals for its project. The ultimate facts were found by the trial court (Finding IX, Trans. 57), but assignment 13 (Trans. 512) charges error in the admission of the testimony on the ground that it is not within any issue framed by the pleadings. If that be true, then the evidence in question is immaterial; and since the cause was tried to the court without a jury plaintiff in error could not have been prejudiced by its admission. "When a judge hears a case without a jury," says Woods, Circuit Judge, in *Oates v. U. S.* 147 C. C. A. 207, 233 Fed. 201, at page 205, "he is supposed to act only on proper evidence, and if on review it is found that the evidence properly admitted justifies the decree it ought to be affirmed and it ought not to be reversed." The same decision quotes the rule laid down by Chief Justice

Marshall in *Field v. U. S.* 9 Pet. 202, 9 L. ed. 94, as follows: "As the cause was * * * not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself constitute any ground for a reversal of the judgment." The same court in *Arthurs v. Hart,* 17 How. 6, 15 L. ed. 30, draws a clear distinction, where trial by jury has been waived, between the admission of evidence and the refusal of proper evidence, and reaffirms the doctrine of *Field v. U. S. supra.* To the same effect is

U. S. v. Ballinger, 35 App. D. C. 436.

Lynch v. Grayson, 5 N. Mex. 509; 25 Pac. 998.

Mitchell v. Beckman, 64 Cal. 123; 28 Pac. 112.

This doctrine is in harmony with the general rule of practice in condemnation cases as stated and supported by citation of numerous cases in 7 Enc. Pl. & Prac. 650: "Errors and irregularities which have prejudiced no rights of the appellant will not be regarded on his appeal, even though the rights of other parties who do not appeal may have been adversely affected. This rule is frequently applied in cases where improper but harmless evidence was admitted, or where faulty but harmless instructions were given in the court below."

It cannot be said, however, that either the testimony or the finding on this subject is irrelevant. Both possibly may be immaterial, in the sense of being nonessential because, as above shown, there is no requirement of law, nor rule of pleading of which we are aware, that makes such facts jurisdictional. Under the averments of paragraphs III and IV of the complaint (Trans. 8) and the specific denials in paragraphs III

and IV of the answer (Trans. 30), however, they are at least pertinent if not highly important. It is also to be noted that no exception was taken by plaintiff in error to the finding which was based upon the evidence in question.

Assignment 5 (Trans. 507) challenges the ruling of the trial court respecting designation of the lands to be overflowed. The contention seems to be that the complaint must allege with precise exactness the boundaries of the land to be taken and that the proof must be limited strictly to the description thus given. The provision of the statute heretofore quoted does not warrant a rule of such harshness. The law contemplates no more than a reasonable exactitude in the description and evidently recognizes occasions for some latitude dependent upon the conditions and circumstances of particular cases. It calls for a description of the property sought to be appropriated with "*convenient* certainty" (L. O. L. Sec. 6862, *supra*). That is to say, such description as it is convenient for the plaintiff to make at the time of filing its complaint. The general rule appears to be that a corporation having the power to exercise the right of eminent domain must be permitted, in a modified degree, to determine for itself the amount of land necessary for the use for which it is sought to be taken. It is entitled to a reasonable latitude and discretion so long as it seeks in good faith to appropriate land for a public purpose, and may anticipate future growth and expansion. These rights of course are subject to the power of the court to prevent an abuse, but, as was said by the Supreme Court of the United States in a case involving the sale of surplus water stored by a public service company on lands condemned for reservoir purposes (*Kaukauna W. & P. Co. v. Green Bay & M. Canal Co.,* 142 U. S. 254; 35 L. Ed. 1004):

"So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement."

2 Nichols on Em. Domain, pp. 150, 177, 181, 190, 203.

Lewis on Em. Domain, Secs. 239, 279.

Bell v. Mattoon Waterworks Co., 245 Ill. 544; 137 Am. S. R. 338; 19 Ann. Cas. 153.

Neitzel v. Spokane Int. Ry. Co., 80 Wash. 30; 141 Pac. 186.

Vallejo & N. R. Co. v. Home Savings Bank, 24 Cal. App. 166; 140 Pac. 974.

The case of *Eastern Oregon Land Co. v. Willow River L. & I. Co.,* 122 C. C. A. 636, 204 Fed. 516, is pertinent. Although the question there arose under an Oregon statute (L. O. L. Secs. 6525 et. seq.) giving right of eminent domain to private corporations in respect of irrigation projects, the rule ought to be at least as liberal regarding public irrigation districts. We quote from page 524, 205 Fed.:

"Without merit, also, is the contention that the plaintiff should be denied the right to condemn the right of way described in the complaint, for the

reason that the route thereof varies from that which is described in the notice of April 7, 1908. It is not the intention of the law that the appropriator, when it resorts to condemnation proceedings, shall be held to the exact line of the route described in its notice, or in the map of its general route. The law of 1891 provides that the notice shall contain 'a general description of the course of said ditch or canal or flume,' and further provides that a map shall be filed 'showing the general route.' The statute, therefore, does not require that the corporation shall, in its appropriation notice, fix upon a precise line, from which it shall not thereafter deviate in the slightest degree. The very language of the statute shows that the law is complied with if the notice and map contain no more than a general description. The notice in this case complies with the statute. It gave what it declared to be the 'general courses and direction.' Having given such a general description of the course of its ditch, a corporation, when it comes into court in a condemnation suit for its right of way, is required for the first time to define the definite line of its ditch. That was done in the present case, and the defendant can claim no prejudice to it from the fact that the description in the notice was but the general description which is required by the act."

True, this comment relates to a statute containing different language, but in principle a description with "convenient certainty" required by Sec. 6862, L. O. L., would seem to impose no greater precision of pleading than the words from the act of 1891 quoted in the foregoing opinion.

But perhaps the most effectual confutation of the fifth assignment of error is to be found in the record. The complaint, after alleging the adoption of surveys and reports, location of dam to be constructed to a height of about 107 feet, giving the contour of highest flow

line at an elevation of 3420 feet or thereabouts, avers that defendant's lands "lie in such position with reference to said dam and reservoir site as that about two thousand five hundred acres of said land as hereinafter particularly described will be submerged at said high flow line by waters to be stored by the said dam and reservoir of the plaintiff, and that practically the whole of said lands are needed by and are necessary for the purposes of the plaintiff, and it is necessary that plaintiff should have, and it requires, all of said lands for such public use for irrigation purposes" (Trans. 11-12). Then follows a particular description of the lands by legal subdivisions of the Government survey, the whole constituting a description of the lands sought to be taken with as much certainty, under the circumstances and the nature of the use and taking, as the plaintiff could conveniently allege at the time, which is all the statute requires. Paragraph V of the answer (Trans. 31) puts some of the statements in issue but *"admits that said dam is so located that it will submerge all the land described in said complaint."* Since the judgment condemned no lands of defendant which were not so described—in fact, omitted eighty acres therein described as heretofore stated—defendant's admission cuts the ground from under the fifth assignment of error. The complaint does *"indicate"* (to adopt defendant's phraseology) "the lands which were *intended to be overflowed,"* and, according to the express admission of the answer *does* "show *what particular lands would be overflowed."* Hence, there was no error in overruling demurrer to the complaint, and in denying motion to make the complaint more definite and certain in that particular.

The Testimony.

Assignments 6 to 9 (Trans. 507-509) present the question of whether a witness to the value of lands may on direct examination be interrogated respecting other sales to test his knowledge and judgment, and ascertain the basis of his opinion. Had the witnesses been asked these questions on cross-examination, or had the court propounded them in the course of the direct examination, there would be no room for discussion. The court or jury is entitled to know the worth of a witness' estimate as to value. It can be ascertained only by knowing from what standpoint the estimate is made, and upon what facts, experience and observations his opinion is founded. The questions objected to were proper for that purpose and defendant's criticism therefore goes only to the time when the questions were put. The conduct of a trial and the order in which the testimony is introduced are matters in the discretion of the trial court and its rulings in that respect will not be disturbed on appeal except for an abuse of discretion. No such showing is attempted to be made, nor, inasmuch as the case was tried without a jury, could there be any such showing. The trial judge himself may have wanted to ask the questions objected to—he could properly have anticipated counsel for the plaintiff in propounding the questions. Counsel for defendant doubtless would, on cross-examination, have asked those or similar questions designed to test the knowledge and credibility of the witnesses. Then why quibble over the time or order of their asking?

But aside from this, the questions were proper. In *Lynch v. United States,* 71 C. C. A. 59, 138 Fed. 535, a witness called by the plaintiff was interrogated similarly to the witnesses in this case on direct examination as to specific sales. Objection was made on the same

grounds urged here, and this court, affirming the lower court, held that the question was proper and the testimony admissible for the purpose of ascertaining what knowledge the witness had on the subject, and was relevant to the question as to his qualification. Although the rule is different in some states, the great weight of authority sustains the position of this court in the case above cited, as appears from the text and citation of cases in 1 Jones Commentaries on the Law of Evidence, Sec. 168, pp. 854-860, and in volume II of the same work, Sec. 363, pp. 877-880. Another writer expresses the rule thus: "Where a witness is called upon to express an opinion, either as to the value or to the damages or benefits resulting from the improvement, it is proper, *either in the direct* or cross-examination, to test the value of his opinion by requiring him to state the elements of his calculation, although the evidence adduced by the answers may be inadmissible as independent evidence" (5 Enc. of Ev. p. 211).

There is another good reason why no error can be predicated on assignments 6 to 9. It is to be found in the argument hereinbefore presented on another point in connection with citation of *Oates v. U. S.* 147 C. C. A. 207, 233 Fed. 201; *Field v. U. S.,* 9 Pet. 202, 9 L. Ed. 94 and other cases. As the cause was not tried by a jury the trial judge is presumed to have passed judgment only on evidence properly admitted, and exceptions to the admission of the testimony in question are not properly the subject of a bill of exceptions. It makes no difference whether the evidence was admissible or not, because plaintiff in error was not prejudiced by its admission. The admission of immaterial or irrelevant evidence is harmless error where it does not affect the finding (*Weems v. George,* 13 How. 190, 14 L. Ed. 108; *Union Consol. Mining Co. v. Taylor,* 100 U. S.

37, 25 L. Ed. 541; *Reed v. Stapp,* 3 C. C. A. 244, 52 Fed. 641).

Assignments 10, 11 and 12 (Trans. 509-511) charge the trial court with error in overruling defendant's objections to the qualifications of the witnesses C. C. Hunt, J. F. Weaver and E. M. Gregg, who testified as to the value of the lands. The qualification of a witness is always a question for the court (1 Jones on Ev., Sec. 363, p. 879). The credibility of the witness and the weight to be given to his testimony are questions for the jury. The weight and credence to be given to the testimony of the witness named were matters of argument to be addressed to the triers of fact (*Congress Etc. Co. v. Edgar,* 99 U. S. 645, 25 L. Ed. 487). The admission of the testimony rested solely in the judicial discretion of the court (*N. Y. Evening Post v. Chaloner,* C. C. A. 265 Fed. 204, 216, Feb. 18, 1920). No exception is taken to the admission of the testimony, the objection going only to the qualification of the witnesses. In a good many jurisdictions the ruling of the trial court on the competency of a witness to give opinion testimony is not subject to review (Rodgers on Expert Testimony, Sec. 22) and in the jurisdictions where such ruling is reviewable it is only done where the court has committed a plain and palpable error in matter of law.

The rule as laid down in *Stillwell Mfg. Co. v. Phelps,* 130 U. S. 520, 32 L. Ed. 1035, where the lower court had excluded the testimony of a witness called on a question of value, may be said to be as well settled as any question of federal trial practice. Mr. Justice Gray, speaking for the court, said:

> "No error is shown in the exclusion of Geissner's testimony as to the rental value of a mill which he had never seen and knew nothing of. Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make

his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law."

This rule has been affirmed many times. In *Iron Co. v. Blake,* 144 U. S. 476, 36 L. Ed. 510, the court said:

"How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous."

This court, in *Union Pac. Ry. Co. v. Novak,* 9 C. C. A. 629, 61 Fed. 573, said:

"The question whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive, and will not be reversed unless manifestly erroneous, as matter of law."

The following cases approve and reaffirm the rule:

Island etc. Co. v. Tolson, 139 U. S. 551, 35 L. Ed. 270.

Gila Valley Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521.

St. Louis & S. F. Ry. Co. v. Bradley, 4 C. C. A. 528, 54 Fed. 630, 633.

Bradford Glycerine Co. v. Kizer, 51 C. C. A. 524, 113 Fed. 894.

U. S. v. German, 115 Fed. 987, 989.

Kenney v. Meddaugh, 55 C. C. A. 115, 118 Fed. 209, 220.

Williamson v. Berlin Mills Co., C. C. A. 190 Fed. 1, 3.

St. Louis I. M. & S. Ry. Co. v. Reed, C. C. A. 216 Fed. 741, 743.

It should be remembered that in connection with plaintiff's averment of an attempt to agree with defendant on amount of compensation to be paid for the lands, there is an allegation that plaintiff offered $55,000 and that the reasonable and market value was no greater than that sum (Trans. 12). The answer admits the offer but alleges that the same "was not made in good faith nor was the said amount the amount which said plaintiff believed to be the value of said property but said sum offered was a mere sham for the purpose of enabling said plaintiff to institute this action and at said time said plaintiff well knew that the said land was worth vastly more than said sum" (Trans. 32).

These statements raised an issue upon which it was incumbent for plaintiff to present proofs. The attempt to agree with the owner in condemnation cases is a statutory requirement and an offer must be made in good faith. Prior to bringing the action in July, 1919, the directors of the district had selected and requested Messrs. Hunt, Weaver and Gregg, disinterested farmers and men of affairs who had resided and operated in that part of the country for several years (Trans. 382-383, 407-408, 428-429) to go upon the lands of defendant and make an examination and report their appraisement of the value thereof (Trans. 92). They did so and appraised the property at $50,877.75 (Trans. 392, 415, 440). The district then offered defendant $55,000 for its lands. The testimony of the three appraisers was relevant and material on the issue of bona fides of the plaintiff in its effort to agree on value with the defendant and of its offer to pay $55,000 as the fair, reasonable value thereof, irrespective of the qualifications of the witnesses, as tending to show that the offer was not sham nor the amount fixed arbitrarily and at hap-

hazard, but was the result of an independent and disinterested appraisement.

The remark of Judge Morrow of this court in the decision in the case of *Lynch v. United States,* 71 C. C. A. 59, 138 Fed. 535, fits this point like a glove. Change of names and amounts makes a paraphrase more than merely apropos: "It is evident that the defendant was not prejudiced by the testimony of Hunt, Weaver and Gregg that the property was worth *$50,877.75,* since the only inference that can be drawn from the testimony is that the trial judge fixed the value at *$90,000.*"

Moreover, even if the trial court erred in admitting the testimony of said witnesses a reversal could be justified only by invoking what Judge Coxe in *Press Pub. Co. v. Monteith,* 103 C. C. A. 502-508, 180 Fed. 356, 362, called the "archaic" rule that if error be discovered, no matter how trivial, prejudice must be presumed. There is no showing here that the rights of plaintiff in error were injuriously affected by the alleged error. Prejudice will not be presumed, and if a just result, which is the object of all litigation, was reached there was no error (*Miller v. Continental Shipbuilding Corporation,* C. C. A. 265 Fed. 158, 164, March 12, 1920; *Hoogendorn v. Daniel,* 120 C. C. A. 537, 202 Fed. 431). Findings will not be set aside for the admission of incompetent evidence if there be other competent evidence to support the conclusion, unless it appears that the court in making its decision relied upon such irrelevant evidence (*Grayson v. Lynch,* 163 U. S. 468, 41 L. Ed. 230; *Miller v. Houston Co.,* 5 C. C. A. 134, 55 Fed. 366).

The Findings.

Assignments 14 to 19 inclusive (Trans. 512-514) in substance challenge the action of the court, as a trier of facts, in fixing the amount of damages or value of the property at $90,000 instead of $143,000 or $250,000 or some other amount greater than $90,000.

Assignment 18 (Trans. 514) presents one feature not common to the others of this group. It refers to hay which had been cut by defendant during the season of 1919 and was stacked on the property at the time of the trial. Plaintiff had no use for it and did not seek to condemn it. It was dragged into the case by an amendment to the answer filed after the trial was commenced (Trans. 40-42). The author of the article on Eminent Domain in 15 Cyc. 899, lays down the rule that if other property than that described in the complaint is brought into the case on cross petition, it is incumbent on the party thus bringing it in to show in the first instance that it was taken or damaged. No such showing was made. There was some testimony to the effect that if defendant had to move the hay out of the way of advancing flood waters some expense would be incurred, but that contingency was not shown to be imminent. There was also testimony to the effect that the hay could advantageously be fed to the defendant's live stock before the occasion for moving it arose. The trial judge appears to have considered it in arriving at his conclusion, for he said: "I have not included the hay now on the property. It is not sought to be condemned. It is personal property and will be no more affected by the judgment in this case than any other personal property belonging to the defendant, now on the ranch."

In view of assignments 1, 2, 3 and 20 (Trans. 506, 514) and the great pother made by plaintiff in error

over the failure of the district to allege whether it sought the title or only an easement in the lands, a resort to the *tu tuoque* argument may be excused. If the complaint is deficient in that respect why, when defendant pitched that thousand tons of hay into the case with its answer, did it not allege whether it was necessary for the district to acquire the ownership thereof or a mere easement therein? Some further mention of the hay will be found in the Addenda to this brief. It has no further importance here, if it ever had any.

If the errors alleged in assignments 14 to 19 are to be considered it necessitates the examination and weighing by this court of 425 pages of testimony contained in the record (Trans. 74-499). It is possible that each member of this court would arrive at a conclusion different from that of the trial judge and different from each other. On the question of damages and value the defendant called twenty-four witnesses, and their opinions varied from $133,770 to $405,000 (Trans. 92-265, 474-498). The plaintiff called twelve witnesses whose estimates varied from $50,877.75 to $65,040. As the trial judge remarked in his memorandum opinion:

> "None of the witnesses on either side, testifying as to value, except Messrs. Gilchrest, Hunt, Gregg and Weaver, had an intimate acquaintance with the property or had made a careful examination thereof for the purpose of qualifying to testify as to value. Gilchrest is perhaps more familiar with it than any other witness. He was superintendent of the defendant for many years and as such developed the property to its present state. His testimony and estimate of value, however, must, I think, be weighed in the light of his present attitude towards the company. Messrs. Hunt, Gregg and Weaver were exceedingly intelligent and fair witnesses. They live, however, many miles from the property and I am persuaded their estimate of its value was

> unconsciously colored by the time at which they made their examination and a comparison of it with property with which they were more intimately acquainted and accustomed to cultivate and deal in. None of the witnesses for the defendant had anything but a general knowledge of the property, its production or the nature and character of the soil. They spent a few hours riding over it in an automobile a short time before the hearing, and formed their opinions from a cursory examination and their general knowledge of it and the country and the business carried on there. I have not the slightest doubt that each and every witness was entirely sincere and intended to and did give to the court his best opinion and judgment on the subject based on his qualifications to do so. But I am equally convinced that defendant's witnesses placed the value too high, and those of the plaintiff too low." (Trans. 49-50.)

Gilchrist testified that $59,715 was the fair value and market price of the land (Trans. 310-311), and Hunt, Gregg and Weaver placed the value at $50,877.75 (Trans. 392, 415, 440). The court found the market value of the lands to be $90,000 (Trans. 58). With equal consistency the plaintiff could fairly predicate error on this finding as being $40,000 in excess of the true and just amount as shown by its witnesses. If, by the judgment of condemnation plaintiff acquired nothing but a bare easement in the lands, as claimed by the defendant, then $90,000 is certainly too much. There was no testimony whatever on the value, market or otherwise, of a mere easement in the lands. All of the witnesses on both sides were interrogated respecting elements of value which could only be predicated upon a transfer of the entire title. That the court's conclusion was drawn accordingly is apparent from the language of his opinion: "After a careful consideration of all the evidence and the argument of counsel, I have con-

cluded that considering the property as a whole, the improvements thereon, the relation of the several parts to each other, its location, situation, character and adaptability to the various uses to which it can be put, that $90,000 is the fair and reasonable value thereof, and what it may fairly be believed one desiring and able to purchase would give for it if it were offered in the market."

Had there been no special findings the general finding would have precluded any review except as to the rulings of the court in the progress of the trial. The fact that the court made special findings does not alter the rule that they have the effect of a verdict of a jury and are conclusive if there be any evidence to support them, and the review is limited to a determination of the sufficiency of the facts as found by the court to support the judgment.

U. S. Rev. Stat. Secs. 649, 700; 6 Fed. Stat. Ann. 2d Ed. p. 205.

Pac. Postal Tel. Cable Co. v. Fleischner, 14 C. C. A. 166; 66 Fed. 899.

King v. Smith, 49 C. C. A. 46; 110 Fed. 95.

U. S. v. U. S. Fidelity & Guar. Co., 235 U. S. 512; 59 L. Ed. 696.

Adamson v. Gilliland, 242 U. S. 350; 61 L. Ed. 356.

Los Angeles G. & E. Corp. v. Western Gas Const. Co., 124 C. C. A. 200; 205 Fed. 707, 715.

Central etc. Co. v. Dunkley Co., 159 C. C. A. 648; 247 Fed. 790.

Stanley v. Board etc., 121 U. S. 535; 30 L. Ed. 1000.

Streeter v. Sanitary Dist., 66 C. C. A. 190; 133 Fed. 124.

U. S. Fidelity & G. Co. v. Board, 76 C. C. A. 114; 145 Fed. 144.

None of the assignments question the sufficiency of the findings to support the judgment, the contention being merely insufficiency of evidence to support the finding of ultimate facts. If the ultimate facts found have any support in the evidence it follows that the judgment is sound. The only possible inquiry then is whether the record contains any legal evidence tending to sustain the ultimate facts found. If there is, then the findings will not be disturbed. This court is not charged with the duty of weighing testimony nor of measuring preponderance. A special finding is unassailable when it depends upon conflicting testimony or upon the credibility of witnesses. A special finding of fact is inconclusive upon the appellate court only when, upon a fair examination of the whole record, it can be said that there is no evidence tending to support such finding.

Dooley v. Pease, 180 U. S. 126; 45 L. Ed. 457.

Eastern Oregon Land Co. v. Willow River L. & I. Co., 122 C. C. A. 636; 204 Fed. 516.

Sayward v. Dexter, 19 C. C. A. 176; 72 Fed. 758, 769.

San Fernando Copper Mining Co. v. Humphrey, 64 C. C. A. 544; 130 Fed. 298.

Ware v. Wunder Brewing Co., 87 C. C. A. 235; 160 Fed. 79.

Syracuse Township v. Rollins, 44 C. C. A. 277; 104 Fed. 958.

Pabst Brewing Co. v. E. Clemens Horst Co. (C. C. A. 9th Cir.), 264 Fed. 909.

Security Nat. Bank v. Old Nat. Bank, 154 C. C. A. 1; 241 Fed. 6.

Since, then, as Judge Gilbert said in the case of *San Fernando Copper Mining & R. Co. v. Humphrey, supra,* it is not the province of this court "to review the evidence further than may be necessary to discover that the case is not one wherein there was no evidence to justify the finding," little remains to be said on behalf of defendant in error. A mere reading of the testimony, we apprehend, will be all that the court will find necessary to discover that there was ample evidence on both sides to justify any finding on the question of damages from $50,000 up to some of the absurdly high estimates of defendant's witnesses. More than one reference has been made herein to the testimony of Mr. Gilchrist, who, as the learned trial judge remarked, "is perhaps more familiar with it than any other witness. He was superintendent of the defendant for many years and as such developed the property to its present state. His testimony and estimate of value, however, must I think be weighed in the light of his present attitude towards the company." Gilchrist said the property was fairly worth a certain sum. Many other witnesses testified to smaller and greater sums. The trial judge weighed the evidence and reached a conclusion greater than Gilchrist or any of the plaintiff's witnesses, and less than any of the defendant's witnesses save perhaps one. His award is nearly twice the average of plaintiff's witnesses and about half the average of defendant's witnesses. Here, then, is a problem whose solution depends upon the preponderance of testimony and the credibility of witnesses—two elements respecting which no Federal Court of review has any function or duty whatever. In reaching his conclusion the trial judge manifestly must

have been influenced by those proper considerations open only to one who has the advantage of seeing the witnesses and hearing them testify. The atmosphere of the case, the psychology of the trial, the demeanor, manner and emphasis of the witnesses—these and many other things which do not register in the record make his decision final on all questions of fact about which there is any conflict. The instant case affords a peculiarly apt demonstration of the soundness of the rule.

Plaintiff in error, at page 41 of its brief, concedes that this court, in view of the conflict of evidence on the questions of value and damages, can not review the testimony; but it proceeds, nevertheless, with extensive citation thereto and comment thereon "for the purpose of showing" says the brief, "the importance of the errors committed by the court." It is claimed that the importance of the alleged errors is shown by the fact that a "large preponderance of the evidence showed a value of over $145,000 for agriculutral purposes." Perhaps; but it was up to the trial judge to credit as much or as little of that evidence as he saw fit. Similarly as to defendant's witnesses. Neither side "has anything" on the other in this respect. Counsel for plaintiff in error ought not to appropriate for their witnesses more than their fair share of the compliment paid by the trial judge when he said in his opinion that: "I have not the slightest doubt that each and every witness was entirely sincere and intended to and did give the court his best opinion and judgment on the subject based on his qualifications to do so. But I am equally convinced that defendant's witnesses placed the value too high, and those of the plaintiff too low." None of them were liars but some of them may have been more or less crazy in the head.

But this is not the way to demonstrate errors of law occurring at the trial. Those errors, if any were com-

mitted, do not depend upon the result of the court's judgment upon the facts. Whether a court errs in settling the pleadings or in the admission of evidence does not remain an open question until the verdict is returned. A party can not speculate with the rules of law, and argue that because the judgment in his favor is not as large as he thinks it ought to be, the importance of alleged errors is thereby magnified to proportions that warrant a reversal. Were this a sound argument the converse would be true, with the result that an error of law is never an error of law when the party is satisfied with the judgment. The defendant in error is not satisfied with the amount of the judgment. We think it is too large, but it does not follow that there was reversible error. If we got nothing but an easement in that land; nothing but a right of periodic aqueous possession whose extent depends wholly upon seasonal meterological conditions; become trespassers every time we plant our feet an inch above the constantly advancing or receding water line of our reservoir; if, from March to June, we are to soak the sagebrush, greasewood flats of those desert hills with our stored water and make them thrive with grasses and pasturage from July to January to the greater profit of the Pacific Live Stock Company than it ever realized from the entire ranch, then it was not damaged $97,000 worth by the limited, conditional and restricted appropriation, and we no longer *think* the judgment was too large, we *know* it. But, as heretofore stated, the matter of easement or fee title not being in this case there was no error and the judgment should be affirmed.

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ADDENDA

It would save time and reduce the labor of the court could the two causes be submitted together, but, for lack of time, it is doubtful if the record in the equity case will reach the court before the date set for the argument in the condemnation action.

Judgment in the latter was entered December 9, 1919. On January 3, 1920, the Pacific Live Stock Co. filed in the court below its bill of complaint against the Irrigation District, its directors and secretary and Gerald Stanfield, to whom the District had leased part of the condemned lands, alleging in substance that the Irrigation District acquired only an easement in the lands theretofore appropriated in said condemnation action, and praying for an injunction restraining defendants from removing the improvements, feeding upon or depasturing said lands, or interfering with the alleged right of complainant to feed upon and depasture the same, and for a decree adjudging the Irrigation District to be the owner of only an easement therein. An answer was filled February 6, which denied the equities of the bill, set up the proceedings, findings and judgment in the condemnation case (discussed in the foregoing brief) and a lease to defendant Gerald Stanfield of the outlying corners and a strip lying between high flood line and low water mark of the reservoir site varying in width with the rise and fall of stored waters.

An application was made for a temporary injunction and on February 9, 1920, Judge Bean granted the same in the memorandum decision quoted in the Appendix to brief of plaintiff in error. An amended answer was filed June 14, 1920, wherein, as a further defense, it is alleged in substance that after the said judgment of condemnation the board of directors of the District found and determined that portions of said land would

not be needed for the purposes of the District during parts of each year and thereupon leased such portions to defendant Gerald Stanfield for pasturage purposes subject to the use thereof at all times for the storage of waters by the Irrigation District.

The cause was tried June 22, 1920. Plaintiff admitted the new matter set up in the amended answer. Its superintendent testified in substance that it continued to occupy the premises after the judgment of condemnation and fed the thousand tons of hay complained of in its seventeenth assignment of error and at pages 33 to 36 of its brief to its own cattle on the lands in question before the water in the reservoir reached the hay; that it had removed some of the buildings to other lands owned by it and had torn down and removed beyond high water other structures including fencing, and that the receding waters of the reservoir had left the land more productive and in better condition for pasturage purposes than it was before the overflow. The defendants showed that some 50,000 acre-feet of water had been stored during the season, covering about 1860 acres of the 2500 acres described in the condemnation suit.

On August 23, 1920, the trial judge directed a decree substantially as prayed for injoining defendants from interfering with the removal by plaintiff of said buildings, fences, barns, sheds, corrals, etc., and from pasturing or otherwise using and enjoying the pasturage and feed growing upon said lands at times when the same or any part thereof are not flooded and when such use and enjoyment by plaintiff will not interfere with the use of said premises for reservoir purposes.

The court's memorandum opinion on final hearing is as follows:

"The questions raised on the final hearing of this

suit are substantially the same as those presented in the application for a preliminary injunction. I have examined them aided by the elaborate briefs of counsel and feel constrained to adhere to the views expressed in the injunction hearing. For the reasons given in the memorandum then filed a decree will be entered in favor of plaintiff as prayed for."

Petition for appeal, order allowing the same and bond on appeal from said decree were filed September 15, 1920, and citation on appeal issued.

The single question is whether by its condemnation of the land and payment of the judgment the Irrigation District obtained a title to the lands or a mere easement therein, and the answer must be found in the Oregon Laws. At pages 17 and 18 of its brief plaintiff in error cites many authorities but they are in point if, and only to the extent that, they interpret and apply statutes identical with those of Oregon, or announce general principles applicable alike to all eminent domain statutes. In this memorandum it is not necessary to take the time and space required to analyze and comment upon them in detail, the purpose hereof being merely to define the position and contention of the Irrigation District. The Oregon cases cited are in point only on three general propositions too well settled to require citation, namely: (a) The legislature cannot authorize any corporation to appropriate the property of an individual without just compensation first assessed and tendered; (b) cannot authorize a *private* corporation such as a railroad to acquire by condemnation a title freed from a public use; (c) while statutes providing for condemnation should be strictly construed, they should also be construed so as to effectuate the purpose for which they were enacted and give effect to all the provisions of the law (*Oswego D. & R. Co. v. Cobb,* 66

Or. 587, 598; 1 Lewis Em. Dom. 3d Ed. Sec. 338; Nichols on Em. Dom. Sec. 358).

On this text the argument for the Irrigation District proceeds. We contend that an interpretation of the Oregon statute, giving effect to all its provisions, so as to effectuate the purpose for which it was enacted, vests public irrigation districts with the title to lands condemned for reservoir sites.

The Warm Springs Irrigation District is a public corporation. It is an arm of the state, and although in some respects resembles a private corporation, is vested by law with all the rights, powers and privileges of the state in respect of the acquisition of private property for public use.

> Laws of 1917, Chap. 357, Secs. 1, 14, 31, pp. 743, 751, 763.
>
> Laws of 1919, Chap. 267, Sec. 2, p. 443.
>
> Herrett v. Warm Springs Irrigation District, 86, Or. 343.
>
> In re Madera Irrigation District, 92 Cal. 296, 14 L. R. A. 755, 27 Am. S. R. 106.
>
> Turlock Irr. Dist. v. Williams, 76 Cal. 360.
>
> Board of Directors v. Peterson, 64 Or. 46, 51.

Its status when exercising the right of eminent domain may therefore be said to be on a higher plane than that of a private corporation, organized for private gain. An unqualified fee cannot be taken by condemnation by a *private* corporation without *express* authority of a statute, whereas, in the case of a municipal corporation, the language of the statute granting the right of condemnation, although not in express terms mentioning a fee simple estate, may be broad enough to vest an absolute title without being technical in its terms.

> Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Hudson & M. R. Co. v. Wendel, 193 N. Y. 166.

It is not necessary that the authority to take a fee be given to a public corporation in express terms, or that exact or technical language should be used in the enabling act, in order that the fee or the whole title of the owner pass by the condemnation proceedings. In the absence of express and precise provisions, the intention of the act and the construction to be put upon its terms may be gathered from the general scope and tenor. If the legislative intention to vest the fee is thus made clear and this intention is consistent with the language employed, effect will be given to the intention.

Driscoll v. City of New Haven, 75 Conn. 92; 52 Atl. 618, 620.

Newton v. Perry, 163 Mass. 319; 39 N. E. 1032.

1 Lewis on Eminent Domain 3d Ed., Secs. 388, 389, pp. 709, 710.

2 Nichols on Eminent Domain 2d Ed., Sec. 358, p. 989.

Ward v. Boston Street Com., 217 Mass. 381.

In re City of New York, 217 N. Y. 1.

Mills on Eminent Domain 2d Ed., Sec. 49, p. 153.

In the absence of constitutional restrictions, the legislature is the exclusive judge of the extent, degree, and quality of interest which are proper to be taken. Courts can determine questions of public use, but the legislature alone can say what estate shall be taken.

Secombe v. Milwaukee etc. R. R. Co., 23 Wall. 108; 23 L. Ed. 67.

Shoemaker v. U. S., 147 U. S. 282, 298; 37 L. Ed. 170, 184.

Sweet v. Rechel, 159 U. S. 380; 40 L. Ed. 188.

U. S. v. Gettsburg Elec. Ry. Co., 160 U. S. 668, 685; 40 L. Ed. 576, 582.

Adirondack Ry. Co. v. State, 176 U. S. 335, 349; 44 L. Ed. 492, 500.

Sears v. Akron, 246 U. S. 242, 251; 62 L. Ed. 688, 698.

Burnett v. Commonwealth, 169 Mass. 417.

Hellen v. Medford, 188 Mass. 42; 69 L. R. A. 314, 316; 108 Am. S. R. 459.

Davis v. Hallock, 44 Or. 246; 252.

Shasta Power Co. v. Walker, 149 Fed. 568, 570.

Cooley, Const. Lim., 7 Ed. 809.

Note, 22 L. R. A., N. S. 76.

Lewis, Em. Dom., Secs. 277, 596.

When and what estate shall be taken is a question of policy over which the courts have no supervision. If the statute authorizes the taking of a fee, it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose which the legislature had in view. That is a legislative and not a judicial question.

Brooklyn Park Com. v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70.

Sweet v. Buffalo etc. Co., 79 N. Y. 293.

Driscoll v. New Haven, 75 Conn. 92.

Clendaniel v. Conrad, 3 Boyce (Del.), 549; Ann. Cas. 1915 B 968, 985.

U. S. Pipe Line Co. v. Del. L. & W. R. R. Co. 62 N. J. L. 254; 42 L. R. A. 572, 578

15 Cyc. 1018.

We are not now concerned with private irrigation companies, nor with rights of way for ditches, railroads or canals, nor with city parks, streets, docks or highways. The inquiry relates solely to a reservoir site for a public irrigation district. Applying the above stated general principles to the construction of the laws of

Oregon, did the Warm Springs Irrigation District acquire the title to the lands in question for a reservoir site, or did it acquire only an easement for that purpose?

The law quoted in extenso in the foregoing brief applies only to such public bodies. Section 31 of the act, which confers the power of eminent domain was amended March 3, 1919, and provides inter alia:

> "Said board shall also have the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights, rights of way, easements and other property including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals and works proposed to be constructed by said board."

Here is ample power to take any form of property or rights in property, whether lands, water, water rights, rights of way, easements or other property necessary for an irrigation system; but the legislature evidently intended to grant unquestioned power to appropriate for *reservoirs for the storage of waters* not merely *easements* or rights *in* land, *but the land itself* as distinguished from an easement or right enumerated in the first part of the section. To that enumeration the legislature added the significant clause:

> "and shall *also* have the right to so acquire *lands*, and all necessary appurtenances for *reservoirs* and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of said district."

There is a further distinction made in said section between easements or rights of way, and lands; for after granting rights of way over state lands it de-

clares the use of water for irrigation, together with all water rights, rights of way for canals and ditches, *sites for reservoirs,* etc., to be a public use more necessary and more beneficial than any other use, either public or private, to which said water, water rights, rights to appropriate water, *lands* or other property may have been or may be appropriated.

The section then provides:

> "The *legal title* to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, *and shall be held by such district in trust* for and is hereby dedicated and set apart to the uses and purposes set forth in this act; and said board is hereby authorized and empowered to *hold, use, acquire, manage, occupy, possess* and *dispose* of said property as herein provided."

"All property" and "said property," the legal title to which is vested in the district to be held in trust by it, and to be managed, occupied, possessed and disposed of by the board, include, of course, the kinds of property mentioned in the first part of the section, that is to say, *first* "all lands and waters and water rights, rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals and works proposed to be constructed by said board;" *second* "and also *lands* and all necessary appurtenances for *reservoirs* for the storage of needful waters," etc.

The last clause of Sec. 31, vesting legal title to all property acquired in the irrigation district to be held in trust for and to the uses and purposes set forth in the act, and empowering the board to hold, use, acquire,

manage, occupy, possess and dispose of said property, clearly contemplates absolute ownership of some of the property at least. The language is too broad to refer only to easements and rights in property, and puts the district in a position analogous to a municipality which acquires land for a public park of which it has been said:

> "The legal title became vested in the city, not for its own use in a corporate capacity, but in perpetual trust for the use of all who at any time might enjoy the benefit of a public park."
>
> Holt v. Somerville, 127 Mass. 408, 411.

Certainly, there is nothing in the section that reserves any right to the original private owner of the site for a reservoir in land taken for that purpose. The legal title to the site so taken is in the district in trust but the original owner is not one of the cestui que trustent.

It is clear that the legislature intended to distinguish lands and ownership of lands and the right to acquire and hold title to lands, from rights *in* or *over* lands and the acquirement of easements therein. A water right, right of way, an easement, in or over canals and works, and the irrigation system or project of a private owner might be sufficient for the necessities of the irrigation district for "any canal or canals and works proposed to be constructed by said board." Up to this point in the statute the power conferred comprehends the acquirement by the district of title to the property or title to an easement therein as may be needed. But the ensuing clause: *"and shall also have the right to so acquire* (i. e. by condemnation) *lands* and all necessary appurtenances *for reservoirs"* makes no reference to easements or rights in lands.

"Lands" of course includes any lesser estate than fee simple therein, but all parts of the section must be given

a meaning if possible, and when the law speaks of taking lands, rights of way and easements for *canals and works* in one clause and follows this with a grant of power to *acquire lands* for a *reservoir,* not mentioning any lesser interest than the whole estate in the lands as was done in the preceding clause, the legislature must have contemplated that the use of land by a public corporation as a reservoir site for the storage of waters would be inconsistent with retention of any interest therein by the private owner, and intended the district to take the absolute title. The legislature must have thought that an easement in land for a reservoir site and storage of waters—a use in its nature fixed, unchangeable and permanent—would not satisfy the requirements of the public; that such a use would be continuous and peculiarly exclusive, and therefore unequivocally provided for condemnation of "lands," the entire estate of the private owner, both legal and equitable, for reservoir sites for the storage of needed waters.

That there should be no doubt of its intention to vest the ownership in fee of any lands acquired by an irrigation district, and of the right of the district to sell or otherwise dispose of the same, the legislature itself placed an interpretation upon the law above quoted by the passage of the act of February 25, 1919, being Chapter 138, Laws of 1919, page 193, as follows:

> "AN ACT To authorize drainage and irrigation districts to sell or dispose of real property acquired for the uses and purposes of said district.
>
> ***Be it Enacted by the People of the State of Oregon:***
>
> Section 1. Whenever any drainage or irrigation district heretofore or hereafter created shall have acquired any lands, by gift, purchase or by the right of eminent domain or otherwise, for the uses and purposes of the said district and shall thereafter by reason of a change of its plans or for any other reason shall determine that all or any part

> thereof is no longer necessary for the uses or purposes for which it has been acquired, said district is hereby given the right to sell or dispose of said lands or any part thereof, either at private or public sale, and the officers of said district otherwise authorized to excute conveyances shall have the authority to make such conveyance."

This act is contemporaneous with and relates to the same subject as the other act quoted, passed at the same session of the legislature. It is a familiar rule in Oregon and perhaps everywhere, that contemporaneous statutes and acts relating to the same subject where not repugnant or inconsistent with each other, are in *pari materia,* and are to be construed as though their several provisions were incorporated together and constituted one entire act for the purpose of arriving at the intent of the legislature. (*Miller v. Tobin,* 16 Or. 540, 556; *Smith v. Kelly,* 24 Or. 464, 474; *Stoppenback v. Multnomah County,* 71 Or. 493, 509.) This rule is particularly applicable when in the case of two enactments one is the complement of the other (*Stoppenback v. Multnomah County, supra*).

It is to be noted that the act refers only to *lands* acquired by gift, purchase, or by eminent domain or otherwise. Rights of way and easements are not mentioned. Whether the legislature also intended to confer power of sale or other disposition of such rights in property as easements, is beside the question here. The act speaks of lands acquired by eminent domain or by any of the other methods enumerated, and gives the district absolute power of sale and disposal—a power consistent only with ownership of the fee. If the legislature had not intended by Sec. 31 of the Act of 1917 and 1919, to vest absolute title to lands acquired by the district by condemnation, the words: "or by right of eminent domain," in the act approved February 25, 1919, last

quoted, are superfluous and meaningless. It is not necessary to cite authority on the proposition that every word and clause of a statute must be given effect if possible, and the clause in question is in complete harmony with the provision of Sec. 31 granting power to acquire by lease, purchase, condemnation or other legal means "lands for reservoirs." Grant of the right to sell and dispose of lands acquired by the right of eminent domain is the corollary of the grant of power to acquire, and raises an implication so strong as to amount to a positive declaration that the original grant of power to acquire by condemnation meant to acquire the fee. The legislature indubitably must have meant that condemnation of a reservoir site gives the district title thereto, otherwise the grant of power to sell or dispose of it "*or any part thereof,* either at private or public sale" and "to execute conveyances," means nothing. That those words mean nothing is unthinkable because the very title of the act is declaratory of their import. Nor is the power to sell and convey in anywise made to depend on how or by what method the district acquired title. Whether obtained by gift, purchase or condemnation, the right to sell remains.

If, therefore, following the well settled rule, the act of February 25, 1919, be read as a part of Section 31 first above quoted, treating the two as constituting one act, we have the following expression of the legislative intention:

> "This board and its agents and employes shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation or drainage works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights,

rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals and works proposed to be constructed by said board, and shall also have the right to so acquire lands, and all necessary appurtenances for reservoirs and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of said district. The property, the right to condemn which is hereby given, shall include property already devoted to public use which is less necessary than the use for which it is required by the district, whether used for irrigation or any other purpose. The right of way is hereby given, dedicated and set apart, to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state. In the acquisition of property or rights by condemnation, the board shall proceed in the name of the district under the provisions of the laws of the state of Oregon."

* * * * *

"The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act; and said board is hereby authorized and empowered to hold, use, acquire, manage, occupy, possess and dispose of said property as herein provided."

"Whenever any drainage or irrigation district heretofore or hereafter created shall have acquired any lands, by gift, purchase or by the right of eminent domain or otherwise, for the uses and purposes of the said district and shall thereafter by reason of a change of its plans or for any other

> reason shall determine that all or any part thereof is no longer necessary for the uses or purposes for which it has been acquired, said district is hereby given the right to sell or dispose of said lands or any part thereof, either at private or public sale, and the officers of said district otherwise authorized to execute conveyances shall have the authority to make such conveyance."

Thus far we have considered the Act of February 25, 1919, only as to its effect as an aid to the construction of Sec. 31 of the Acts of 1917 and 1919, and without regard to the exercise by the district of the power of sale therein conferred. Our contention is that said act must be considered in any inquiry as to whether the legislature intended by Sec. 31 to vest in the district a transferable title, freed from reversion, of lands condemned for a reservoir site. It is too plain for argument that if Chapter 138 *supra* had given irrigation districts power to sell and dispose of such lands as had been acquired by *gift or purchase,* but without mention of lands acquired by right of eminent domain, the legislative interpretation would be just the opposite of what the district contends. The district needed no legislative grant of power to sell and dispose of that which had been given to it, or property it had purchased and paid for; and since the act extends the power to sell and dispose of lands acquired "by the right of eminent domain" the same as of lands acquired by gift, purchase or otherwise, there seems to us no room for any doubt that condemnation of land for a reservoir site gave the district a marketable title the same as purchase of the lands would have done.

But the admitted facts bring the district within the provisions of the act giving it the right, when *"for any reason"* it shall determine that any part of the land acquired is no longer necessary for the uses and purposes

for which it was acquired, to sell or dispose any part of said land. It determined that some portion of said land would not be overflowed during the 1920 season and would therefore not be needed for the storage of waters. The right to sell and dispose includes the right to lease, and hence the district leased to defendant Stanfield that portion of the land which from year to year might not be overflowed. There may be some years when practically the whole of the land will be overflowed. In other years, like 1920, the water may cover little more than two-thirds of the land. The lessee takes those chances, and the district obtains a fixed rental which is a substantial help in meeting the interest on its bonds. In this connection, and as an aid to the construction of the act, one of the reasons that influenced the legislature in passing the act of February 25, 1919, as a complement of the eminent domain section, may be adverted to.

On the day after the approval of that act by the governor there was filed in the office of the Secretary of State, House Joint Resolution No. 32, proposing an amendment to the Oregon Constitution to be known as Article XIb (Laws of Oregon, 1919, page 848), for the purpose of providing funds for the payment by the state, for a period not exceeding five years, of interest on bonds theretofore or thereafter issued by irrigation and drainage districts. Since the state purposed to pledge its credit to guarantee for five years the payment of interest on Irrigation District bonds the legislature quite naturally reinforced and broadened the rights and powers of the districts with a view, no doubt, of affording them every opportunity of paying their way so as to obviate as much as possible the necessity of resort to the state guaranty. The proposed amendment was submitted to the people at the election, June

3, 1919, and was adopted by a substantial majority. It became effective by proclamation of the governor June 23, 1919 (Laws of Oregon, Special Session 1920, pages 5-10).

Regardless of whether Section 31 of the act of 1917, as amended in 1919, vests the district with the title to the lands condemned for reservoir purposes, the district has brought itself within the provisions of the act of February 25, 1919 (Laws of 1919, Chapter 138) and its disposal of portions of the land not needed for water storage, being in strict accordance with that act, should be ratified.

If plaintiff still owns the fee in those lands and defendant has nothing but an easement therein to the extent only of water impounded above its dam, the resulting consequences are unique. It creates an ambulatory, peripatetic, periodic, migratory sort of use; an easement that runs up and down hill according to the fall of snow or rain in the mountains miles away; a meterological easement that appears with storms, thaws and floods, and vanishes with cold and drought. The fee simple title and use claimed by plaintiff in such parts of the reservoir site as may not from day to day be covered by stored water is similarly afflicted with a sort of legal St. Vitus dance, and hops up and down over the grease wood convolutions of Warm Springs ranch close upon the heels of defendant's fleeing easement. The evidence shows that this year at high water defendant flooded about 1860 acres of the 2500 which it condemned, leaving plaintiff (according to its contention) with the fee and right of possession and use of some 700 acres. Evaporation and withdrawal have caused the waters to recede each day adding many acres to plaintiff's growing title and reducing defendant's easement by as much. When the floods come next Feb-

ruary and March the operation will be reversed, and in the course of nature it is possible that plaintiff's agitated title may give way to defendant's perambulating easement over some 2400 acres; and so, according to plaintiff's schedule, this fantastic race between a fee simple title and an easement is to go on forever. Said Falstaff in *Henry IV*: "Old father antic the law," and at that he knew nothing of the shimmy nor of its performance by a fee title and an easement.

Chapter 138, Laws of 1919, authorizes the district to sell or dispose of lands not only when by reason of a change in its plans they are no longer necessary for the uses or purposes for which acquired, but *"for any other reason."* Whether or not the board acted wisely in leasing the marginal land is a question that cannot be raised by the plaintiff. The board's action in that behalf can be questioned, if at all, only by the taxpayers in the district or by the State of Oregon. Similarly as to whether authority to "sell or dispose of" includes power to lease. If defendant acquired title to the lands it is no concern of plaintiff what disposition is made of them.

The doctrine is generally prevalent that where the acquisition of lands by exercise of eminent domain is made by a public corporation in good faith for a public purpose, a reasonable discretion and latitude (subject of course to review by the courts) as to the amount to be taken, may be exercised; and that the municipality may anticipate future growth and expansion.

> Neitzel v. Spokane Int. Ry. Co. (Wash.), 141 Pac. 186.
>
> 2 Nichols on Eminent Domain, pp. 150, 177, 181, 190, 203.

The condemnation case was tried on the supposition that plaintiff therein sought the property in perpetuity; all of the testimony went to the entire value of the property; the Live Stock Co. centered a mass of evidence

on the market value of the lands, buildings and other improvements; the court considered "the property as a whole, the improvements thereon, the relation of the several parts to each other, its location, situation, character and adaptability to the various uses to which it can be put" and found that $90,000 was the fair and reasonable value thereof, that is, what "one desiring and able to purchase would give for it if it were offered on the market." It cannot be believed that any one desiring to *purchase the property* would give that sum for the sort of title which it is now claimed the district obtained—a mere fluctuating, ambulatory easement in the land with reversion of the fee to the Live Stock Company the instant water shall cease to be stored thereon.

One of the uses for which the lands was adaptable, considered by the court, was that of grazing or pasturage for live stock. It is the one on which the Live Stock Company laid greatest stress and directed most of its testimony, and must be assumed as the principal element considered in fixing the amount of the judgment. It is that use of the varying area not flooded by impounded waters which the district now seeks to make as an incident of the main object and purpose in condemning the lands for a reservoir site. The judgment followed the statute, appropriated the lands to the district as a part of its irrigation system forever, and decreed the lands and the whole thereof to be its property. It paid the price, and thereby got what the legislature by Sec. 31, Chapter 357, Laws of 1917 (Sec. 2, Chapter 267, Laws 1919) intended it to get, the absolute title, and thereafter by virtue of the power granted to it by Chapter 138, Laws of 1919, it disposed of such portions thereof as it found for the time being no longer necessary for the storage of water, retaining title and

right of resumption of possession and use as the necessities of the district may require.

Defendant paid the full market value of the lands including the buildings and other improvements affixed thereto. In the condemnation proceeding it occupied the position of purchaser and the Live Stock Company that of seller. The district holds under a statute conveyance and its title is, in legal phrase, by purchase (*Burt v. Merchants Insurance Co.,* 106 Mass. 356; 8 Am. Rep. 339, 342). The seller has taken and appropriated some of defendant's property. Those buildings and other improvements were bought and paid for by defendant as a part of the lands condemned (*Jackson v. State,* 213 N. Y. 34; 106 N. E. 758; Ann. Cas. 1916C. 779 and *Note;* L. R. A, 1916D 492 and *Note*). In addition to converting property which it claims to be worth many thousand dollars it also claims right of possession and use of a large part of the lands with reversion of the whole. Every element of equity in this case is on the side of the defendant.

Pursuant to authority of the statute which created it defendant has borrowed, and investors have loaned it, large sums of money on the faith and credit of its ownership of the lands, and the bonds issued and purchased are on the statutory guarantee that: "In addition to the provisions for the payment of said bonds and interest by taxation and other provisions of this act, *all the property of the district, including irrigation and other works, shall be liable for* the indebtedness of the district."

Chapter 357, Sec. 22, Laws 1917, p. 757.

Should the district default, and the bondholders or the United States take possession, as provided in said section, would they be compelled to operate the system forever in case the district did not pay? If they sold

the property to liquidate the debt would the purchaser be bound to operate the irrigation project on penalty of forfeiture for misuser, nonuser, or abandonment? Would the doctrine of reverter apply in favor of the Pacific Live Stock Company as against a purchaser—whether bondholder or the United States—in case of foreclosure? These questions must all be answered in the affirmative if plaintiff is to prevail in this case, because the legislature has given bondholders and purchasers no better title than it has given the district. The provision with reference to the rights of creditors, however, afford strong support to our contention that the law gives the district absolute title. The right to pledge, sell, dispose of and convey property, granted by express unequivocal terms of the statute can mean nothing else, and completely destroy the doctrine of reverter.

> "When only an easement is taken," says Mr. Mills, "it is presumed that the full value is not given and that the owner receives a lesser amount when there is reserved to him the chance of a reversion on a discontinuance of the public use."
>
> Mills on Eminent Domain, Sec. 50, p. 156.

If the act provides that full value should be given for lands, and that lands so taken should be pledged to secure payment of bonds, it must be inferred that a fee was taken.

> Mills on Eminent Domain, Sec. 50, p. 157.
> Brooklyn Park Com. v. Armstrong, 45 N. Y. 234.

When, as in this case, the district acquired the legal title to lands by operation of a law which at the same time in unequivocal terms granted express power to mortgage, sell, dispose of and convey the same; and when, as in this case, the district has paid to the plaintiff full compensation, fairly estimated and without de-

duction or allowance for right of user or reversion, it would be violative not only of well settled rules of construction but of the principles of justice itself to decree that anything less than a fee simple title passed and is now held by defendant.

If the law is otherwise, then on behalf of the Warm Springs Irrigation District and its taxpayers we join with counsel for the Pacific Live Stock Company in asking for a reversal of the judgment fixing the damages in the condemnation case because we are confident that on a retrial thereof neither the judge who tried it nor any jury would render a verdict of $90,000 or anywhere near that amount for a mere easement in that 2500 acres of land.

Respectfully submitted,

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